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**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

In re:

PG&E CORPORATION,

- and -

**PACIFIC GAS AND ELECTRIC
COMPANY,**

Debtors.

☐ Affects PG&E Corporation
☒ Affects Pacific Gas and Electric
Company
☐ Affects both Debtors

** All papers shall be filed in the Lead
Case, No. 19-30088 (DM).*

Bankruptcy Case No. 19-30088 (DM)

Chapter 11
(Lead Case)
(Jointly Administered)

**THIRD OMNIBUS MOTION PURSUANT TO 11 U.S.C § 365(a),
FED. R. BANKR. P. 6006, AND B.L.R. 6006-1 TO
APPROVE THE UTILITY'S ASSUMPTION OF CERTAIN
CONTRACT PRICE DISCOUNTED ENERGY PROCUREMENT
AGREEMENTS
(THE "DISCOUNTED EP ASSUMPTION MOTION")**

Hearing Date: August 28, 2019
Hearing Time: 9:30am (Pacific Time)
Place: United States Bankruptcy Court
Courtroom 17, 16th Floor
San Francisco, CA 94102
Judge: Hon. Dennis Montali

Objection Deadline: August 14, 2019, at 4:00 p.m. (Pacific Time)

NOTICE TO CONTRACT COUNTERPARTIES

The counterparties to each of the EP Agreements (as defined below) to be assumed by Pacific Gas and Electric Company pursuant to this Motion are identified on Exhibit B hereto. If you have received this Motion and you are a counterparty to an EP Agreement with Pacific Gas and Electric Company, please review Exhibit B to determine if this Motion affects your rights thereunder.

PG&E Corporation (“**PG&E Corp.**”) and Pacific Gas and Electric Company (the “**Utility**”), as debtors and debtors in possession (collectively, “**PG&E**” or the “**Debtors**”) in the above-captioned chapter 11 cases (the “**Chapter 11 Cases**”), hereby submit this Motion (the “**Motion**”), pursuant to section 365(a) of title 11 of the United States Code (the “**Bankruptcy Code**”), Rule 6006 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”), and Rule 6006-1 of the Bankruptcy Local Rules for the United States District Court for the Northern District of California (the “**Bankruptcy Local Rules**”), for an order approving the Utility’s assumption of each of the EP Agreements (as defined below), each as amended pursuant to the applicable EP Amendment (as defined below) to incorporate a price reduction of approximately ten percent (10%) and other agreed upon modifications set forth therein.

In support of the Motion, the Debtors submit the Declaration of Marino Monardi (the “**Monardi Declaration**”), filed contemporaneously herewith. A proposed form of order granting the relief requested herein is annexed hereto as Exhibit A (the “**Proposed Order**”).

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. JURISDICTION**

3 The Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334,
4 the *Order Referring Bankruptcy Cases and Proceedings to Bankruptcy Judges*, General Order 24 (N.D.
5 Cal.), and Bankruptcy Local Rule 5011-1(a). This is a core proceeding pursuant to 28 U.S.C. § 157(b).
6 Venue is proper before the Court pursuant to 28 U.S.C. §§ 1408 and 1409.

7 **II. BACKGROUND**

8 On January 29, 2019 (the “**Petition Date**”), the Debtors commenced with the Court
9 voluntary cases under chapter 11 of the Bankruptcy Code. The Debtors continue to operate their
10 businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108
11 of the Bankruptcy Code. No trustee or examiner has been appointed in either of the Chapter 11 Cases.
12 The Debtors’ Chapter 11 Cases are being jointly administered for procedural purposes only pursuant to
13 Bankruptcy Rule 1015(b).

14 On February 12, 2019, the United States Trustee (the “**U.S. Trustee**”) appointed an
15 Official Committee of Unsecured Creditors (the “**Creditors Committee**”). On February 15, 2019, the
16 U.S. Trustee appointed an Official Committee of Tort Claimants (the “**Tort Claimants Committee**”
17 and, together with the Creditors Committee, the “**Committees**”).

18 Additional information regarding the circumstances leading to the commencement of the
19 Chapter 11 Cases and information regarding the Debtors’ businesses and capital structure is set forth in
20 the *Amended Declaration of Jason P. Wells in Support of the First Day Motions and Related Relief*
21 [Docket No. 263] (the “**Wells Declaration**”).

22 **III. THE EP AGREEMENTS**

23 In the ordinary course of its operations, the Utility is party to various types of energy
24 procurement agreements, including, without limitation, (a) power purchase agreements, pursuant to
25 which the Utility purchases electric power from generators, and (b) capacity storage agreements, which
26 provide the Utility access to capacity from energy storage facilities.

The Utility routinely and continuously evaluates its energy procurement agreements in light of, among other things, the Utility's operations, market conditions, pricing, the needs of the Utility's customers, the regulatory requirements imposed on the Utility, and to ensure the Utility is safely and reliably delivering power. As part of that evaluation, the Utility has identified the EP Agreements for assumption in the Chapter 11 Cases. Following discussions with the EP Counterparties (as defined herein), the Utility and each of the respective counterparties have agreed that, in exchange for assumption of the applicable EP Agreement, the parties will enter into the EP Amendments described below, which include valuable discounts for the Utility.

The effectiveness of each of the EP Amendments and assumption of the EP Agreements pursuant to this Motion is conditioned upon the Utility obtaining the necessary approvals from the Bankruptcy Court and California Public Utility Commission (the "CPUC"). Accordingly, contemporaneously herewith, the Utility is seeking CPUC approval for the EP Amendments but, to the extent such approval is not obtained prior to the hearing on this Motion, the Utility requests that the Court approve the Utility's assumption of the EP Agreements, as amended, subject to CPUC approval. Pursuant to the EP Amendments, in the event CPUC approval is not attained within one hundred and eighty (180) days from the date approval is sought from the CPUC or the date of this Motion (whichever is later), either party may terminate the applicable EP Amendment and the assumption of the applicable EP Agreement shall be null and void. The various EP Agreements and the EP Amendments are discussed in further detail below.

A. The Power Purchase Agreements

To enable the Utility to provide power to its customers and meet regulatory requirements, the Utility is party to various power purchase agreements (each, a "PPA") with developers and operators of power generation facilities and projects. Pursuant to this Motion, the Utility is seeking to assume the following three (3) PPAs, each as amended by the applicable PPA Amendment Agreements (as defined below):

- Power Purchase Agreement between the Utility and Re Gaskell West 3 LLC dated September 22, 2017 (the "**Gaskell 3 PPA**");

- Power Purchase Agreement between the Utility and Re Gaskell West 4 LLC dated September 22, 2017 (the “**Gaskell 4 PPA**”); and
- Power Purchase Agreement between the Utility and Re Gaskell West 5 LLC dated September 22, 2017 (the “**Gaskell 5 PPA**” and, together with the Gaskell 3 PPA and the Gaskell 4 PPA, the “**PPAs**”).¹

The PPAs are long-term purchase agreements pursuant to which the Utility will purchase electric power generated by a generation facility or project operated by the respective counterparty to the PPAs (collectively, the “**PPA Counterparties**”). The generation projects that will generate the power to be purchased by the Utility pursuant to the PPAs, however, are currently under development and not yet operational and, as a result, the PPA Counterparties have not yet commenced delivering power to the Utility.² Upon completion of the generation projects, pursuant to the terms of the respective PPAs, the Utility will purchase power from the PPA Counterparties for a period of fifteen years, on a dollar per megawatt hour basis. Consequently, the Utility has no outstanding obligations to the PPA Counterparties under the PPAs, and no cure amounts are owed or payable in connection with the assumption of the PPAs as proposed pursuant to this Motion.

In connection with the proposed assumption of the PPAs, the Utility has negotiated favorable amendments to the PPAs with the PPA Counterparties. These amendments are memorialized in agreements between the Utility and the respective PPA Counterparty (the “**PPA Amendment Agreements**”). Among other things, the Utility and the PPA Counterparties have agreed to a ten percent (10%) discount to the respective per megawatt hour purchase price of power under each PPA. Additionally, the Utility and the PPA Counterparties have agreed to extend project and construction related deadlines in each PPA, and consequently, the time by which the Debtors would be obligated to

¹ A copy of the form of the PPAs available at https://www.pge.com/pge_global/common/pdfs/for-our-business-partners/energy-supply/electric-rfo/wholesale-electric-power-procurement/2017%20PV/PGE_2017_PV_PPA_final.docx. Copies of the actual PPAs and the PPA Amendment Agreements will be provided on a confidential basis to the U.S. Trustee and counsel to the Committees.

²The PPA Counterparties entered into the PPAs prior to the completion of the respective generation projects because the PPA Counterparties use projected future revenue from the PPAs to obtain financing for the development and construction of the projects.

commence purchasing power, by up to 24 months.

B. The Energy Storage Agreements.

To enable the Utility to comply with applicable regulatory requirements related to storage capacity and resource adequacy, the Utility is party to various energy storage agreements with various counterparties that provide energy storage services. Pursuant to this Motion, the Utility is seeking to assume the following two (2) energy storage agreements, each as amended by the applicable ESA Amendment Agreements (as defined below):

- Behind the Retail Meter Capacity Storage Agreement between the Utility and mNOC AERS LLC (“**mNOC**”), dated June 1, 2018, as previously amended by letters dated October 11, 2018 and November 27, 2018 (the “**mNOC ESA**”); and
- Energy Storage Resource Adequacy Agreement between the Utility and Hummingbird Energy Storage, LLC (“**Hummingbird**”), dated June 1, 2018, as previously amended by letters dated October 11, 2018, November 27, 2018 and March 28, 2019, (the “**Hummingbird ESA**” together with the mNOC ESA, the “**ESAs**,”³ and, collectively with the PPAs, the “**EP Agreements**”).

The ESAs are long term agreements, pursuant to which the Utility will purchase storage capacity in certain battery storage projects from the respective counterparties to the ESAs (the “**ESA Counterparties**” and together with the PPA Counterparties, the “**EP Counterparties**”). The Utility utilizes the ESAs to meet the resource adequacy requirements (the “**RARs**”) imposed on it by the CPUC and other regulators. The RARs ensure that California’s load serving entities (including utilities, community choice aggregators, and energy service providers) have sufficient capacity to meet peak electric load demand on their networks, and require that load-serving entities maintain a reserve margin. Like the PPAs, the energy storage projects that are the subject of the ESAs are currently under

³ Copies of the forms of the ESA Agreements are available at http://www.pge.com/includes/docs/word_xls/b2b/wholesaleelectricssuppliersolicitation/Energy_Storage_2016/AppendixF2_CapacityStorageAgreement_IssuanceFinal.docx and http://www.pge.com/includes/docs/word_xls/b2b/wholesaleelectricssuppliersolicitation/Energy_Storage_2016/AppendixF3_BTMCapacityStorageAgreement_IssuanceFinal.docx. Copies of the actual ESAs and ESA Amendment Agreements will be provided on a confidential basis to the U.S. Trustee and counsel to the Committees.

1 development and not yet operational, and the ESA Counterparties have not yet commenced providing
2 storage capacity to the Utility.⁴ Upon completion of the storage projects, the Utility will purchase storage
3 capacity from mNOC and Hummingbird for periods of ten (10) or fifteen (15) years, respectively, on a
4 dollar per kilowatt-month basis. Consequently, the Utility has no outstanding obligations to the ESA
5 Counterparties under the ESAs and no cure amounts are owed or payable in connection with the
6 assumption of the ESAs as proposed pursuant to this Motion.

7 In connection with the assumption of the ESAs, the Utility has negotiated favorable
8 amendments to the ESAs with the ESA Counterparties. The ESA Amendments are memorialized in
9 amendment agreements between the Utility and the respective ESA Counterparty (the “**ESA**
10 **Amendment Agreements**” and, together with the PPA Amendment Agreements, the “**EP**
11 **Amendments**”). Specifically, with respect to the mNOC ESA, among other things, the parties have
12 agreed to discounts on the contract price of approximately eleven percent (11%), and have agreed to
13 extend two project completion milestones in the mNOC ESA by approximately fifteen (15) months,
14 which will result in a corresponding delay to the Utility’s obligations to pay for the additional capacity
15 by approximately fifteen (15) months. Similarly, with respect to the Hummingbird ESA, among other
16 things, the parties have agreed to discounts on the contract price of approximately ten percent (10%) and
17 have agreed to extend two project completion milestones in the Hummingbird ESA by twelve (12)
18 months, which will result in a corresponding delay to the Utility’s obligations to pay for such capacity
19 by approximately twelve (12) months.

20 **IV. ASSUMPTION OF THE EP AGREEMENTS IS IN THE BEST INTERESTS OF THE**
21 **UTILITY, ITS CREDITORS, AND ALL PARTIES IN INTEREST**

22 The Utility’s assumption of the EP Agreements, as amended, should be approved under
23 section 365(a) of the Bankruptcy Code. Section 365(a) provides, in pertinent part, that a debtor in
24 possession “subject to the court’s approval, may assume or reject any executory contract . . . of the
25 debtor.” 11 U.S.C. § 365(a).

26
27 ⁴ The ESA Counterparties use the projected future revenue from the ESAs to obtain financing for the
28 development and construction of the energy storage project.

1 The Supreme Court has defined “executory contracts” as contracts “on which
2 performance is due to some extent on both sides.” *NLRB v Bildisco & Bildisco*, 465 U.S. 513, 522 n.6
3 (1984). The Ninth Circuit has described executory contracts in similar terms, being contracts where
4 “one party’s failure to perform its obligation would excuse the other party’s performance.” *Zurich Am.*
5 *Ins. Co. v. Int’l Fibercom, Inc. (In re Int’l Fibercom, Inc.)*, 503 F.3d 933, 941 (9th Cir. 2007) (citing
6 *Commercial Union Ins. Co. v. Texscan Corp. (In re Texscan Corp.)*, 976 F.2d 1269, 1272 (9th Cir.
7 1992)). The EP Agreements clearly fall within this definition. In each case, there remains material
8 performance obligations on both the Utility and the EP Counterparties.

9 Bankruptcy Courts generally “approve motions to assume, assume and assign, or reject
10 executory contracts or unexpired leases upon a showing that the debtor's decision to take such action
11 will benefit the debtor's estate and is an exercise of sound business judgment.” *In re MF Glob. Holdings*
12 *Ltd.*, 466 B.R. 239, 242 (Bankr. S.D.N.Y. 2012); *see also Durkin v. Benedor Corp. (In re G.I. Indus.,*
13 *Inc.)*, 204 F.3d 1276, 1282 (9th Cir., 2000); *In re Miller*, No. 15-61159-12, 2016 WL 1316763, at *4
14 (Bankr. D. Mont. Apr. 1, 2016).

15 The “business judgment” standard is not a strict standard; it requires only a showing that
16 either assumption or rejection of the executory contract will benefit the debtor’s estate. *See Bakery,*
17 *Confectionary & Tobacco Workers Int’l Union v. Kirkpatrick (In re Kirkpatrick)*, 34 B.R. 767, 769
18 (B.A.P. 9th Cir. 1983); *Pac. Shores Dev. v. At Home Corp. (In re At Home Corp.)*, 292 B.R. 195, 199
19 (N.D. Cal. 2003), *aff’d*, 392 F.3d 1064 (9th Cir. 2004) (“Bankruptcy courts generally approve rejection
20 if the debtor demonstrates that the rejection will benefit the estate under a ‘business judgment’ test.”);
21 *In re Am. Suzuki Motor Corp.*, 494 B.R. 466, 475 n.4 (Bankr. C.D. Cal. 2013). Furthermore, “[c]ourts
22 generally will not second-guess a debtor's business judgment concerning whether the assumption or
23 rejection of an executory contract or unexpired lease would benefit the debtor's estate.” *In re MF Glob.*
24 *Holdings Ltd.*, 466 B.R. at 242; *In re Miller*, 2016 WL 1316763, at *4 (“Although the business judgment
25 is the proper standard for determining whether to permit assumption or rejection of an executory contract
26 or unexpired lease, the court should focus on the business judgment of the trustee or debtor in possession,
27 not on its own business judgment.”). The Court should “presume that the debtor-in-possession acted
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1 prudently, on an informed basis, in good faith, and in the honest belief that the action taken was in the
2 best interests of the bankruptcy estate.” *Agarwal v. Pomona Valley Med. Grp., Inc. (In re Pomona Valley*
3 *Med. Grp., Inc.)*, 476 F.3d 665, 670 (9th Cir. 2007) (in the context of a motion to reject under section
4 365(a)). Only a decision which is “so manifestly unreasonable that it could not be based on sound
5 business judgment, but only on bad faith, or whim or caprice” falls foul of the rule. *Id.*

6 The Utility’s assumption of the EP Agreements, as amended, represents a valid exercise
7 of the Utility’s business judgment and will benefit the Utility’s estate. Energy procurement is a critical
8 aspect of the Utility’s business operations. The Utility is undertaking a careful and thorough review of
9 its portfolio of EP Agreements and has determined that the terms of the EP Agreements, as amended,
10 are reasonable under the circumstances and that maintaining the ongoing, mutually beneficial
11 relationships with the EP Counterparties is in the best interests of the Utility and its estate. Additionally,
12 the EP Agreements ensure that the Utility will continue to have sources of power generated by renewable
13 energy and battery storage capacity, enabling the Utility to comply with the California Renewables
14 Portfolio Standard Program, energy storage compliance requirements, and other related procurement
15 requirements, as required by sections 3291(b)(1)(D) and 3292(b)(1)(D) of the California Public Utilities
16 Code, as recently amended by Assembly Bill 1054.

17 Moreover, as discussed above and in the Monardi Declaration, the Utility has negotiated
18 considerable discounts to the contract prices under the EP Agreements. The Utility estimates that the
19 nominal value of the aggregate savings achieved pursuant to the EP Amendments is approximately \$20
20 million over the collective life of the EP Agreements. Moreover, the Utility has determined that the
21 savings obtained through the discounted contract price far outweighs the milestone extensions that the
22 Utility is granting to the EP Counterparties under the EP Amendments. Such extensions necessarily
23 arose from the Utility’s commencement of the Chapter 11 Cases and the resulting difficulty for the EP
24 Counterparties to obtain the requisite financing to complete the underlying projects. Finally, as discussed
25 above, the assumption of the EP Agreements will not result in any incremental costs to the Debtors’
26 estates because no cure amounts are owed by the Utility to assume the EP Agreements.

27 As set forth above, assumption of each of the EP Agreements, as amended pursuant to
28

1 the applicable EP Amendment, shall be subject to, and conditioned upon, among other things, the Utility
2 obtaining CPUC approval of each of the EP Amendments as provided therein (“**CPUC Approval**”). In
3 the event CPUC Approval is not timely obtained with respect to any EP Amendment (which milestone
4 or deadline may be modified or amended as provided in the applicable EP Amendment), (i) the Utility
5 shall file a notice with the Bankruptcy Court indicating that CPUC Approval has not been obtained with
6 respect to the specific EP Agreement and EP Amendment, and (ii) assumption of the applicable EP
7 Agreement shall be null and void with all of the applicable parties’ respective rights reserved.

8 Accordingly, for the reasons set forth herein, the Utility respectfully submits that the
9 assumption of the EP Agreements, as amended, is a valid exercise of the Utility’s business judgment and
10 should be approved.

11 **V. REQUIREMENTS OF BANKRUPTCY RULE 6006**

12 The Utility requests authorization pursuant to Bankruptcy Rule 6006(e) to file this Motion
13 as an omnibus motion to assume the EP Agreements. As outlined above, the EP Agreements are all
14 energy procurement agreements providing for the purchase or storage of electric power, and the
15 circumstances of, and reason for their assumption are similar. Accordingly, the Utility believes there is
16 ample cause for an order permitting this Motion to be heard as an omnibus motion to avoid the Utility’s
17 estate bearing the cost of five (5), separate motions to assume each EP Agreement. There is no detriment
18 to any party in interest in having the Motion heard as an omnibus motion.

19 **VI. NOTICE**

20 Notice of this Motion will be provided to (i) the Office of the United States Trustee for
21 Region 17 (Attn: Andrew Vara, Esq. and Timothy Laffredi, Esq.); (ii) counsel to the Creditors
22 Committee; (iii) counsel to the Tort Claimants Committee; (iv) the Securities and Exchange
23 Commission; (v) the Internal Revenue Service; (vi) the Office of the California Attorney General; (vii)
24 the California Public Utilities Commission; (viii) the Nuclear Regulatory Commission; (ix) the Federal
25 Energy Regulatory Commission; (x) the Office of the United States Attorney for the Northern District
26 of California; (xi) counsel for the agent under the Debtors’ debtor in possession financing facility; (xii)
27 the EP Counterparties; and (xiii) those persons who have formally appeared in these Chapter 11 Cases
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1 and requested service pursuant to Bankruptcy Rule 2002. The Utility respectfully submits that no further
2 notice is required.

3 No previous request for the relief sought herein in respect to the EP Agreements has been
4 made by the Utility to this or any other court.

5 WHEREFORE the Utility respectfully request entry of an order granting (i) the relief
6 requested herein as a sound exercise of the Utility's business judgment and in the best interests of its
7 estate, creditors, shareholders, and all other parties in interest, and (ii) such other and further relief as the
8 Court may deem just and appropriate.

9
10
11 Dated: July 31, 2019

WEIL, GOTSHAL & MANGES LLP

KELLER & BENVENUTTI LLP

By: /s/ Stephen Karotkin

Stephen Karotkin

*Attorneys for Debtors
and Debtors in Possession*